

**IN THE HIGH COURT OF TANZANIA**

**COMMERCIAL DIVISION**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 79 OF 2019**

**M/S I & M BANK (T) LIMITED .....PLAINTIFF**

**VRS**

**ROYAL PROCUREMENT COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**TAHER HAKIMYDDIN JIVAJEE.....2<sup>ND</sup> DEFENDANT**

**UMMEHANI TAHER JIVAJEE.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**B.K. PHILLIP,J**

This case arises from a loan facility agreement granted to the 1<sup>st</sup> defendant by the plaintiff. It is the plaintiff's case that by virtue of the loan facility agreement executed between the plaintiff and the first defendant on 17<sup>th</sup> January 2014, the plaintiff granted to the 1<sup>st</sup> defendant an overdraft facility to tune a of TZS 250,000,000/= as a working capital .The said overdraft facility was secured by general debenture charge over all fixed floating assets of the 1<sup>st</sup> defendant with specific charges to the existing vehicles thereof , legal Mortgage over apartment No.7A on plot No.11 Block 47 ,Somali street , Kariakoo, Dar es Salaam in the name of the Taher Jivajee, Promissory Note and Personal Guarantee and Indemnity by the 2<sup>nd</sup> and 3<sup>rd</sup>defendants. The plaintiff alleged that following the 1<sup>st</sup> defendant's breach of the contract for the overdraft facility by failure to repay the overdraft amount as agreed, he was compelled to sell the mortgaged property. However, the proceeds of the sales of the mortgaged property , could not clear the outstanding amount in the overdraft facility, thus as at 31<sup>st</sup> May 2019, there was an outstanding

amount to a tune of TZS 576,700,692.39. Furthermore, the plaintiff alleged that he made efforts through oral and written demand notes to request the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, being guarantors to the overdraft facility granted to the 1<sup>st</sup> defendant to pay the outstanding amount but in vain. Thus, in this case the plaintiff prays for judgment and decree against the defendants as follows;

- a) A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are in breach of the loan agreement and contract of guarantee and indemnity respectively by their failure to discharge their duties and obligations in accordance with the agreements.*
- b) That, the Defendants jointly and severally be ordered to immediately pay to the Plaintiff the outstanding amount of TZS 576,700,692.39 [Say Tanzania Shillings Five Hundred Seventy Six Million, Seven Hundred Thousand, Six Hundred Ninety Two and Thirty Nine Cents] as of 31<sup>st</sup> May 2019.*
- c) Payment of interest on decretal sum at a commercial rate from the date of judgment till payment in full.*
- d) Payment of general damages to be assessed by this Honourable Court.*
- e) Payment of costs of this suit.*
- f) Any other relief[s] that the Honourable Court may deem fit and just to grant.*

In their joint written statement of defence the defendants admitted that the 1<sup>st</sup> defendant was granted the overdraft facility and did not dispute the existence of all the securities for the loan as alleged by the plaintiff. However, they alleged that the outstanding amount was cleared upon the disposal of the mortgaged property and the other securities which they contended that were worth over one Billion Shillings.

In this case the plaintiff was represented by Advocate Dr Onesmo Michael. Advocate Hashiru Lugwisa appeared for the defendants up to the Final Pre Trial Conference.

At the Final Pre Trial Conference the following issues were framed for determination by the Court;

- i) Whether the defendants have already discharged their obligations arising from the loan agreement between the plaintiff and the 1<sup>st</sup> defendant dated 17<sup>th</sup> January 2014.*
- ii) What reliefs are the parties entitled to.*

The parties were ordered to file the witness statements as provided under Rule 49 of the High Court (Commercial Division) Procedure Rules, 2012 as amended by GN. No. 107 of 2019. The plaintiff filed one witness statement whereas defendants did not file any witness statement. Consequently, the plaintiff's advocate prayed to proceed with hearing of the case ex-parte. The court, granted the prayer. Thus, this case proceeded ex-parte in the absence of the defendants.

Now, let me go straight to the determination of the issues, starting with the first issue that is, **Whether the defendants have already discharged their obligations arising from the loan agreement between the plaintiff and the 1<sup>st</sup> defendant dated 17<sup>th</sup> January 2014**, in proving that the defendants have not discharged their obligations arising from the loan agreement, the plaintiff brought in court one witness, namely Fatema Rattansi, who testified as PW1. In her testimony, PW1 narrated the background of the case as I have summarized it herein above. She further testified as follows; That the plaintiff granted to the 1<sup>st</sup> defendant an overdraft facility to a tune of TZS 250,000,000/= payable within twelve months ( 12) with interests at the rate of 20% per annum. That in case of default in payment of the monthly installments as agreed , the whole amount granted under the credit facility agreement plus accrued interests could be demanded and the bank had powers to institute legal proceedings for recovery of the outstanding amount. It was PW1's testimony that the overdraft facility was secured by general debenture charge over all fixed floating assets of the 1<sup>st</sup> defendant with specific charges to the existing vehicles thereof, legal Mortgage over

apartment No.7A on plot No.11 Block 47, Somali street , Kariakoo, Dar es Salaam in the name of the Taher Jivajee , Promissory Note and Personal Guarantee and Indemnity by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. That the 2<sup>nd</sup> and 3<sup>rd</sup> defendants being guarantor to the credit facility did not take any step to clear the outstanding balance.

Moreover, PW1 testified that the calculations of the outstanding amount as from 31<sup>st</sup> May 2018 was done manually in a separate paper because the 1<sup>st</sup> defendant's Bank account was closed and the debt was written off, thus it was not possible to obtain an electronically generated bank statement. PW1 further testified that the fact that the debt was written off did not affect its existence and the obligations of the defendants to pay the outstanding amount. After doing the computation of the outstanding amount manually, she found that as at 31<sup>st</sup> May 2019 the outstanding amount was TZS. 661,430,692.39 which was reduced to TZS 576,700,692.39 upon receiving proceeds from the sale of collateral which was TZS. 84,730,000/= only.

PW 1 tendered in evidence the following documents; The loan facility agreement (Exhibit P1), Debenture deed between the 1<sup>st</sup> defendant and the plaintiff (Exhibit P2), The Promissory Note made by the 1<sup>st</sup> defendant (exhibit P3), the Guarantee and Indemnity document between the plaintiff and 2<sup>nd</sup> and 3<sup>rd</sup> defendants (Exhibit P4) and the bank statement (Exhibit P5).

In his final submissions, the plaintiff's advocates submitted that the plaintiff has proved his claims against the defendants. He was of the opinion that since the defendants have not challenged the transactions indicated in exhibit P5 then it can be safely held that the plaintiff has proved his case to the standard required by the law.

From the foregoing, the testimony of PW1, shows that the plaintiff's contention that the defendants have not discharged their obligation is based on three major allegations made by the plaintiff, these are first, the 1<sup>st</sup> defendant failed to clear the outstanding amount as agreed,

secondly that the mortgaged property which was offered as security for the overdraft facility was sold but the proceeds obtained from of the sale of the aforesaid mortgaged property was TZS. 84,730,000/= only and the same was not enough to clear the outstanding amount, which as at 31<sup>st</sup> May 2019 was TZS. 661,430,692.39 and thirdly, that the plaintiff's efforts through oral and written demands for payment of the outstanding loan amount proved futile.

In my considered view, in proving the defendants failed to discharge their obligations arising from the loan agreements, the plaintiff's witness was required to tender in evidence the alleged written demands notes served to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to prove that they have refused/neglected to discharge their obligations arising from the loan agreement. In fact Articles, 2.1, 2.3, 11.1 and 11.2 of the Guarantee and Indemnity agreement between the plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants provide that the plaintiff has to demand for the payment of the amount stated in the guarantee in writing. For ease of reference let me reproduce the contents of the afore mentioned articles hereunder;

*"GUARANTEE AND INDEMNITY*

*TO: 1&M (T) LIMITED (the Bank /Lender")*

*P.O. Box 1509,*

*Dar es Salaam*

*FROM: Taher Hakimuddin Jivajee*

*P.O. Box 7910,*

*Dar es Salaam*

*Ummerhani Taher Jivajee*

*P.O. Box 7910,*

*Dar e Salaam.*

2.1 *The Guarantors hereby unconditionally Guarantee to discharge the Debtor's Obligations to the Bank **on demand** in writing by the Bank to the Guarantors without deduction, set-off or counterclaim together with Guarantees Interest thereon from the date of such demand.*

2.3 *The Guarantors further agree to pay Expenses to the bank **on demand** in writing, together with Guarantees Interest thereon from the date of such demand.*

**PROVIDED THAT** *the amount recoverable from the Guarantors under this Guarantee (whether assuery or by way of indemnity) shall not exceed the total of **TSHS. 250,000,000.00(Tanzanian Shillings Two hundred Fifty Million Only)** as **Overdraft facility** together with interest on the sums since the date on which interest was last compounded in the books of the Bank, and Guarantees Interest on that total from the date of demand, and Expenses(including any interest or Guarantees Interest accruing thereon).*

11.1 *Any **demand made under this Guarantee shall be in writing** signed by an authorized official of the bank.*

11.2 *Any such demand may be served personally on the Guarantors or left for him at his address or place of business last known to the Bank or sent by post or by facsimile or telex to that address.*

Likewise the promissory Note signed by the 1<sup>st</sup> defendant states as follows;

**" M/S ROYAL PROCUREMENT COMPANY LTD.** of P.O. Box 7910, Dar es Salaam, promise, **ON DEMAND**, to pay M/S I & M BANK (T) LTD of P.O. Box 1509, Dar es Salaam, the sum of **TZS 250,000,000/- (Tanzanian Shillings Two Hundred Fifty Million Only)** with interest charged at Bank's TZS Prime Lending rate plus 1% effective 20% per annum".

*(emphasis is added)*

Moreover, the plaintiff has failed to bring any tangible evidence to prove that the proceeds of the sale in respect of the mortgaged property was TZS 84,730,000/= only. Under normal circumstances, the plaintiff would have brought in court the certificate of sale of the mortgaged property to prove that the money obtained from the sale of the mortgaged property was not enough to clear the outstanding amount. Also, PW1 has not said anything about the properties offered as security under the debenture deed.

In addition to the above, I wish to point out here that the claimed outstanding amount is indicated in a document attached to the bank statement which I was prepared manually. It is different from the bank statements which are generated electronically. The explanations given by PW1 regarding that document is that she prepared it manually because the debt was written off and the 1<sup>st</sup> defendant's Bank account was closed. Now, the pertinent issue here is; is it proper for the plaintiff (the Bank) to start maintaining separate records apart from the normal Electronic Bank system for recording client's bank transactions, with the aim of continuing charging interests in respect of the client's debt which is written off. In my considered view, once the debt is written off, the Bank cannot continue charging interests on the amount which has been written off as a bad debt. After the Bank's decision to write off a debt, it is incomprehensible for the same Bank to start dealing with the same debt again and charging interests as if it is still in its books of accounts.

In addition to the above, I have noted with concern that the aforesaid document which indicates the claimed amount does not bear the 1<sup>st</sup> defendant's Bank account number which is indicated in the electronic generated bank statement. There is an affidavit filed in court regarding the authenticity of the bank statement generated electronically, but there is none for aforesaid document which bears the claimed outstanding amount. To say the least, the authenticity of the document that has been tendered

in evidence by the PW1 to prove the alleged outstanding loan amount is questionable and cannot be relied upon by this court. Under the circumstances, although the case has been heard ex-parte, pursuant to the provisions of section 110 of the Evidence Act, I am of a settled view that the plaintiff had a duty to prove that the defendants failed to discharge their obligations arising from the loan agreement between the plaintiff and the 1<sup>st</sup> defendant dated 17<sup>th</sup> January 2014, However, as I have explained herein above, the plaintiff failed to do so.

In the upshot this case is dismissed.

Dated at Dar es Salaam this 27<sup>th</sup> day of July 2020.



A handwritten signature in black ink, appearing to be "B.K. Phillip", with a horizontal line extending to the right.

**B.K.PHILLIP**

**JUDGE**